



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Waukesha Alaska Corporation; VECO Incorporated
File: B-229918; B-229918.2
Date: April 27, 1988

DIGEST

1. Protester who would not be in line for award even if protest were sustained does not have a direct economic interest in the protested agency action and is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1987).
2. Protest questioning awardee's ability to achieve required levels of contract performance is challenge to contracting officer's affirmative determination of responsibility and will not be considered where there is no showing of fraud or bad faith by procurement officials and no failure to apply definitive responsibility criteria.
3. Agency reasonably determined that awardee's price, which was lower than government's estimate, was realistic where awardee, a municipality, operates without profit margin and may benefit from economies of scale due to its existing operations.
4. Protest that awardee will not comply with Buy American Act is matter of contract administration and is not for consideration under General Accounting Office's bid protest function.

DECISION

Waukesha Alaska Corporation^{1/} and VECO, Incorporated,
protest the award of a contract by the Department of the Air

^{1/} Waukesha did not submit a proposal in its own name, but states that it is a 30 percent partner in Galena Energy Corporation (GEC) which did submit a proposal. Since Waukesha did not, itself, submit a proposal it would not be eligible for award and therefore is not an interested party in its own right. Nonetheless, for the purpose of this decision, we assume without concluding that Waukesha is acting as an authorized agent of GEC.

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Force to the City of Galena under request for proposals (RFP) No. F65517-87-R-0002. This solicitation called for proposals to furnish the management, labor and materials necessary to provide electrical energy to Galena Air Force Station, Alaska, for a period of 20 years. Waukesha/GEC's protest is dismissed. VECO's protest is dismissed in part and denied in part.

The solicitation was issued on December 5, 1986, closing date for receipt of proposals was March 25, 1987. On or before the closing date the Air Force received proposals from eight offerors including Waukesha/GEC, VECO and the City of Galena. Galena currently operates a facility which provides electricity for the city's residents. Galena's proposal offered to expand its current capabilities to meet the Air Force's needs. Its proposed price was the lowest price offered and was also lower than the government's estimate.

The Air Force evaluated the proposals received and, based on that evaluation, selected Galena for award of the contract. The Air Force conducted a preaward survey concerning Galena's technical capabilities and financial resources, determined that Galena was a responsible offeror, and awarded the contract on December 4, 1987. Unsuccessful offerors were advised of the award on December 21.

Waukesha/GEC challenges Galena's authority to participate in the procurement, arguing that Galena is not authorized to operate in a private capacity competing with private enterprise, and also asserts that Galena has no authority under the Alaska Constitution to borrow the money it will need to purchase the additional equipment necessary to meet its contractual obligations. Waukesha/GEC's protest did not initially challenge the Air Force's evaluation of the proposal it submitted.

The Air Force's administrative report shows that Waukesha/GEC's proposal was evaluated as the fifth-low offer received. The Air Force notes that Waukesha/GEC would not be in line for award even if its protest were sustained.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (Supp. III 1985), an interested party for purposes of eligibility to protest must be an actual or prospective offeror whose direct economic interest is affected by the protested agency action. This statutory requirement is reflected in our Bid Protest Regulations implementing CICA. 4 C.F.R. § 21.0(a) (1987). Where there are intermediate parties eligible for award between the protester and the awardee, the protester's interest is too remote to establish itself as an interested party since it

would not be in line for award even if its protest were sustained. Hydroscience, Inc., B-227989 et al., Nov. 23, 1987, 87-2 CPD ¶ 501.

Although in its comments on the agency report, Waukesha/GEC speculates that the Air Force's evaluation of its proposal may have been defective, it offers no evidence to support that supposition. Accordingly, since Waukesha/GEC would not be in line for contract award even if its protest were sustained, it is not an interested party under CICA and our Bid Protest Regulations and its protest is dismissed.

VECO, who is next in line for award, questions whether Galena will satisfy the requirements of the RFP, section C, paragraph 1.5.2, which states: "The government will require an overall annual electric power availability of 99.9 percent with a maximum unavailability in any one month of two hours". VECO asserts that Galena will be unable to achieve this level of reliability for various reasons including Galena's allegedly inadequate experience as well as the unreliability of its equipment. VECO's protest can be read as challenging either the evaluation of Galena's technical proposal or the contracting officer's affirmative determination of Galena's responsibility. In either event, the protest is dismissed for the reasons stated below.

With respect to technical proposals, particularly that portion concerning the reliability of proposed systems, we note that the RFP required offerors to submit a "Reliability, Availability, and Maintainability" (RAM) analysis. The RFP stated that the RAM analysis must be prepared and certified by a professional engineer and must indicate that the proposed system will meet the 99.9 percent availability goal. Our review of Galena's proposal shows that it included the required RAM analysis, prepared and certified by a professional engineer, and that the analysis indicates that Galena's proposed system will meet the availability goal.

To the extent VECO's protest constitutes a challenge to the Air Force's technical evaluation of the portion of Galena's proposal dealing with reliability, the protest is dismissed. VECO initially identified what it argued were flaws in Galena's technical approach. In its administrative report, the Air Force responded to each technical argument VECO raised, stating why it disagreed with VECO's technical analysis and explaining why it believed its technical evaluation of Galena's proposal was valid. In its comments on the agency report, VECO provided no rebuttal to the agency's technical explanations, instead focusing its comments entirely on the realism of Galena's proposed price. Accordingly, to the extent that VECO's protest challenged

the Air Force's technical evaluation of Galena's proposal, we consider VECO to have abandoned the issue and we will not consider the matter. Action Industrial Supply, B-224819, Jan. 6, 1987, 87-1 CPD ¶ 11.

To the extent VECO is challenging Galena's ability to perform under the contract, its protest constitutes a challenge to Galena's responsibility. Our Office will not consider a protest of an agency's affirmative determination of responsibility absent a showing of fraud or bad faith on the part of the procurement officials or an allegation that definitive responsibility criteria were not applied. 4 C.F.R. § 21.3(f)(5). VECO's disagreement with the Air Force's affirmative responsibility determination, which was based on a positive preaward survey, is insufficient to establish bad faith. Keyes Fibre Company, B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383. Further, we do not construe the availability goal as a definitive responsibility criteria since it merely requires a rationally based projection of system performance by a professional engineer, and does not establish an objective standard against which offerors' capabilities can be conclusively measured. See Nationwide Glove Company, Inc., B-229690, Dec. 23, 1987, 87-2 CPD ¶ 624; Repco Incorporated, B-225496.3, Sept. 18, 1987, 87-2 CPD ¶ 272.

VECO next suggests that Galena may be required to rely on the Alaska Power Authority (APA) for both technical and financial assistance in performing the contract, and questions whether there is an improper relationship between Galena and the APA. The APA is a public corporation established by the Alaska State Legislature to provide assistance to rural Alaska utilities in order to reduce consumer power costs. Alaska Stat. § 44.83.010 et seq. (1984).

As stated above, to the extent this constitutes a challenge to Galena's future performance under the contract, we will not consider the matter. Concerning Galena's relationship with the APA, VECO has offered no evidence and we find no indication of an illegal or improper relationship between Galena and this state corporation. VECO's protest on this issue is dismissed.

VECO next protests that the Air Force's evaluation of Galena's proposed price did not conform to the provisions of section M, paragraph 2.1 of the RFP, which states:

"Proposals that are . . . unrealistically low in price will be deemed reflective of an inherent lack of competence or indicative of a failure to comprehend the complexity and risks of the

contract requirements, and may be grounds for rejection of the proposal. . . ."

VECO maintains that Galena's proposed price is unrealistically low and argues that the Air Force should have found that Galena's low price "reflect[s] an inherent lack of competence" and/or "indicat[es] a failure to comprehend the complexity and risks of the contract requirements." VECO protests that in not rejecting Galena's proposal on the basis of its price, the Air Force failed to apply the RFP provision quoted above.

The Air Force responds that it reviewed Galena's price proposal and obtained certified data concerning all costs associated with Galena's proposed price. It concluded that the proposal was accurate, complete and realistic. The Air Force concluded that Galena's lower price was based on the existence of its plant, equipment, and ongoing operations as well as its capability as a non-profit entity to operate without a profit margin. The Air Force maintains it properly applied the evaluation criteria.

We find no basis to challenge the Air Force's determination concerning Galena's proposed price. Price realism determinations are necessarily judgmental and our Office will not disturb an agency's evaluation in this area unless it is clearly unreasonable. AFL-CIO Appalachian Council, Inc., B-216878, Apr. 12, 1985, 85-1 CPD ¶ 419. In light of Galena's status as a non-profit entity, along with the fact that it is already providing electricity to city residents and therefore may benefit from economies of scale, we do not believe the Air Force's determination is unreasonable. Accordingly, VECO's protest that the Air Force improperly evaluated Galena's proposed price is denied.

VECO next maintains that the equipment Galena has proposed is not manufactured in the United States and, therefore, Galena's proposal does not comply with the requirements of the Buy American Act (Act).

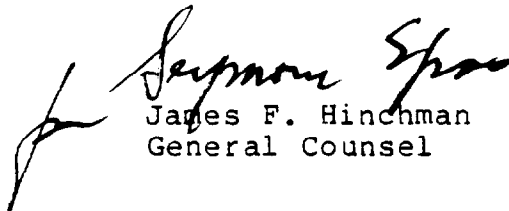
We have reviewed Galena's proposal and determined that it contains the necessary certification concerning compliance with the Act. Since Galena's proposal contains that certification, it is contractually bound to comply with the Act's requirements. Whether it ultimately does, in fact, comply with that Act is a matter of contract administration and is not for consideration under our bid protest function.

4 C.F.R. § 21.3(f); Dura Electric Fluorescent Starter Division, B-225323, Mar. 2, 1987, 87-1 CPD ¶ 234. VECO's protest on this issue is dismissed.

Finally, VECO protests that Galena has been given four surplus fuel storage tanks by the Air Force and is currently arranging to obtain three more. VECO states that such acquisitions represent a cost savings of \$500,000 for Galena and maintains that this constitutes an unfair competitive advantage given Galena by the Air Force.

In its administrative report, the Air Force takes exception to VECO's representations of the facts stating that, more than a year prior to issuance of the RFP, the Air Force transferred four 25,000 gallon tanks through the General Services Administration to the State of Alaska Surplus Property Service. The State of Alaska subsequently conveyed the tanks to Galena. The Air Force states that after the tanks had been transferred to the State of Alaska, the Air Force had no control over their subsequent disposition. The Air Force denies that it has agreed to provide Galena with additional storage tanks. Since in its comments on the agency report VECO fails to respond to, or in any way address, the Air Force's position on this issue, we consider VECO to have abandoned this portion of its protest and will not consider the matter. Action Industrial Supply, B-224819, supra.

Waukesha/GEC's protest is dismissed. VECO's protest is dismissed in part and denied in part.



James F. Hinchman
General Counsel